KEY TO BRIEFS

1 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

2 BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION.

3 BRIEF FOR RESPONDENT INTERLAKE IRON CORPORATION IN OPPOSITION.

4 BRIEF FOR RESPONDENT REPUBLIC STEEL CORPORATION IN OPPOSITION.

5 BRIEF FOR THE UNITED STATES

6 BRIEF OF RESPONDENT INTERLAKE IRON CORPORATION.

7 BRIEF FOR REPUBLIC STEEL CORPORATION.

8 BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY.

9 SUPPLEMENTAL APPENDIX TO BRIEF FOR REPUBLIC STEEL CORPORATION.

10 PETITION FOR REHEARING ON BEHALF OF REPUBLIC STEEL CORPORATION.

11 PETITION OF INTERLAKE IRON CORPORATION, ONE OF RESPONDENTS, FOR REHEARING.

12 PETITION OF RESPONDENT INTERNATIONAL HARVESTER COMPANY FOR REHEARING.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 21 1959
JAMES R. BROWNING, Clerk

No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, *Petitioner*

v.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, and INTERLAKE IRON CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rules involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	23
Appendix A	1a
Appendix B	32a

CITATIONS

CASES:

Archer v. *Greenville Gravel Co.*, 233 U.S. 60	19
Converse v. *Portsmouth Cotton Oil Refining Co.*, 281 Fed. 981, certiorari denied, 260 U.S. 724	18
Debs, In re, 158 U.S. 564	18
New York v. *New Jersey*, 256 U.S. 296	17
North Bloomfield Gravel Mining Co. v. *United States*, 88 Fed. 664	18
Sanitary District v. *United States*, 266 U.S. 405	9-10, 11, 14, 17, 18, 19, 21
Sanitary District of Chicago v. *Chicago Packing Co.*, 241 Ill. App. 288	15-16
United States v. *Anchor Oil Corporation* (S.D. Cal.)	7
United States v. *Bellingham Bay Boom Co.*, 72 Fed. 585; 176 U.S. 211	9
United States v. *Brazoria County*, 2 F.2d 861	12
United States v. *Burns*, 54 Fed. 351	12
United States v. *Ingram*, 203 F.2d 91	18
United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690	8, 20, 21
United States v. *Wilson*, 235 F.2d 251	11, 20
United States v. *Wishkah Boom Co.*, 136 Fed. 42	20
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1	8, 22
Wisconsin v. *Illinois*, 278 U.S. 367	10, 11, 12

STATUTES:

Rivers and Harbors Act of September 19, 1890, 26 Stat. 426:	
Section 7	14
Section 10	2, 8, 19, 32a

Page

Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 33 U.S.C. 403:

Section 10 ..... 2, 12, 13, 33a
Section 12 ..... 2, 19, 33a-34a
Section 13 ..... 2, 15, 16, 21, 34a
Section 15 12
Section 17 ..... 2, 35a
Section 19 12
Section 20 20

MISCELLANEOUS:

21 Cong. Rec. 8604, 8605 22
32 Cong. Rec. 2296-2298, 2923 9
Rule 54(c), F.R.Civ.P. 2, 22
H. Doc. No. 293, 54th Cong., 2d Sess. 9
H. Rept. No. 1345, 83d Cong., 2d Sess. 4
34 Op. A.G. 411-412 10
1 Pomeroy *Equity Jurisprudence* (5th ed. 1941) sec. 253, p. 989 19

In the Supreme Court of the United States

OCTOBER TERM, 1958

No.

UNITED STATES OF AMERICA, *Petitioner*

v.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, and INTERLAKE IRON CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 22, 1959.

OPINIONS BELOW

The memorandum of the district court (App. 91-97)[1] is reported at 155 F. Supp. 442. The opinion of the court of appeals (Appendix A, *infra*, pp. 1a-31a) is not yet reported.

[1] Volume I of the Appendix to Defendants-Appellants' Brief in the court below contains the material relevant to the present issues and will be cited "App."

JURISDICTION

The judgment of the court of appeals was entered January 22, 1959 (Appendix A, *infra*, pp. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the discharge of industrial wastes from steel mills into the Calumet River, a navigable waterway of the United States, resulting in reduction of the navigable capacity of the channel and providing a serious hazard to ships using it, is prohibited by federal law.

2. Whether, if so, the United States is entitled to an order compelling the removal of such obstructions and enjoining future obstruction, or may secure other relief.

STATUTES AND RULES INVOLVED

Section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454 and Sections 10, 12, 13 and 17 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-1153, 33 U.S.C. 403, 406, 407, 413, are set forth in Appendix B hereto, *infra*, pp. 32a-36a, and relevant excerpts are quoted in the discussion *infra*. Rule 54(c), F.R.Civ.P., provides:

> * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

STATEMENT

The district court, after a lengthy trial, enjoined Republic Steel Corporation, International Harvester

Company and Interlake Iron Corporation from depositing industrial solids in the Calumet River without first obtaining a permit from the Chief of Engineers of the Department of the Army providing conditions for the removal of deposits; and ordered each of the companies to restore the depth of the channel to 21 feet by removing designated percentages of deposits. The findings upon which that decree was based may be summarized as follows:

The Calumet River, which because of its slow current is more of a canal than a river, is located some 11 miles south of Chicago Harbor and is a busy waterway used by a large number of lake and foreign ships, many of which are 600 feet or more in length with a 60-foot beam, a loaded draft of 21 feet and a propeller diameter of 15 feet (Fdg. 2, App. 98). Like the Chicago River, the flow of the Calumet has been reversed so that now, except in short periods of heavy rainfall, it flows away from Lake Michigan across the continental divide into the Chicago and Sanitary Ship Canal and on to the Mississippi River (Fdgs. 3-7, App. 98-99).

Since 1881 the Army Corps of Engineers has maintained the channel in the area here in question at a minimum depth of 21 feet and a width of 200 feet (Fdg. 9, App. 99-100). The three companies for many years have operated mills on the banks of the river for the production of iron and related products which create industrial waste, consisting of flue dust containing a high percentage of iron oxide, slag, calcined lime and other solids, and the mills create additional waste, such as coke breeze, mill scale and other solids. The companies use vast quantities of water from the river, totaling some 6,186,120,000 gallons each month. The

water is returned to the Calumet through 27 sewers. Although a substantial amount of the fine dust is recovered by settling basins, the discharges contain solids in fine particles which tend to flocculate into larger units and to deposit on the river bottom (Fdgs. 10-19, App. 100-101).

Prior to 1951 the companies had periodically dredged these industrial solids from the river adjacent to their plants when requested by the United States Army Corps of Engineers and in 1951 the channel was restored to a minimum depth of 21 feet, the companies prorating the cost according to their pig-iron production (Fdg. 20, App. 101-102). No similar joint restoration has been undertaken since that time and the only work has been removal of relatively small quantities of material in connection with removal of deposits from slips and along river docks of International Harvester and Interlake (Fdg. 21, App. 102). Soundings since 1951 have shown a progressive decrease in the depth of the river in the vicinity of the companies' mills (Fdg. 25, App. 103). All of the companies refused the demand of the Corps of Engineers that they dredge in the vicinity of their mills (Fdg. 26, App. 103). In reporting the Civil Functions, Department of the Army, Appropriation Bill for the Fiscal Year 1955, which included funds for maintenance of rivers and harbors, the House Committee said (H. Rept. No. 1345, 83d Cong., 2d Sess., p. 10):

> In Calumet River and Harbor, Illinois, and Cleveland Harbor, Ohio, a serious problem exists with reference to illegal deposits by private industries in the navigation channels. These deposits are in violation of Section 13 of the 1899 River and Harbor Act. The deposits have

> created shoaling conditions to the detriment of the Federally maintained channels. As of the time of the hearings on this bill the Corps of Engineers had been unsuccessful in their efforts to have all of the companies responsible pay their proportionate share toward removal of the deposits. The very companies which have refused to cooperate are beneficiaries of both construction and maintenance funds provided in this bill. Such an attitude on the part of such local interests is inconceivable. It will be expected that the Corps of Engineers will make vigorous efforts to secure proper compliance with the law governing illegal deposits, including action by the Department of Justice if necessary. The Chief of Engineers is directed to file with the committee, not later than December 15, 1954, the actions taken on this matter and the results obtained.[2]

The trial court made detailed findings as to the possible causes of shoaling in the river, resulting in ultimate findings that (Fdgs. 38-39, App. 105-106):

> 38. The preponderance of the evidence shows that all three defendants, through their various sewer outfalls, are emptying industrial solids into the Calumet River, and the Government is entitled to an injunction against all of the defendants restraining such practice in the future.
>
> 39. The preponderance of the evidence further shows that the action of the defendants in dumping industrial solids into the Calumet River in the vicinity of their mills since 1951 has resulted in considerable shoaling in the Federal channel reducing the depth of the channel in some places to 17 feet and in some instances to 12 feet, along

[2] The present case was filed November 1, 1954; and on December 9, 1954, the Chief of Engineers so reported to the House Committee.

> the sides of the channel, thus reducing the navigable capacity of the channel and providing a serious hazard to ships using the channel.

The findings were that 81.5% of the waste in the channel was chargeable to the defendant companies, of which there was allocated 36.78% to Republic Steel, 36.31% to International Harvester and 26.91% to Interlake (Fdg. 48, App. 107-108). The court concluded that the United States was entitled to relief and entered a decree, to be effective within one year, which (1) enjoined the companies from depositing industrial solids and flue dust in the channel without first obtaining a permit from the Chief of Engineers and (2) ordered them to restore the channel to a minimum depth of 21 feet.

The court of appeals reversed and directed dismissal of the complaint on the ground that the acts were not prohibited by law (App. A, *infra*, pp. 1a-22a). As an alternative ground it held that the court could not grant the injunctive relief sought because Congress "has by strong implication excluded the same" (App. A, *infra*, pp. 22a-31a).

REASONS FOR GRANTING THE WRIT

1. The importance which the pertinent Committee of the House of Representatives attaches to this precise problem is apparent from its report, *supra*, pp. 4-5. The letter of the Chief of Engineers, filed on December 9, 1954, in response to that report, said in part:

> Dredging by other companies of similar shoaling, or funds contributed to the cost of dredging, have resulted in estimated savings to the United States for the fiscal year 1953 and 1954 of $425,000 at Indiana Harbor; and $162,000 at Calumet Har-

bor and River. Since 1949 the total estimated savings to the United States by agreements reached with some of the major industries in connection with removing or preventing industrial shoaling is $3,500,000 and with the exception of the three companies above, no case has gone to the courts.

Extension of these figures to all the navigable streams which may be used by iron and steel mills, as well as other industries, for the deposit of waste makes the problem one of first magnitude.

The impact of the conclusions of law on allied cases adds to the importance of the decision. As our discussion will show, the question of legality of the deposits rests upon construction of three different provisions of the Rivers and Harbors Act of 1899 which has been for 60 years the basic law whereby the federal control over navigable streams has been exercised. And the question of availability of injunctive relief to enforce those prohibitions is of prime importance in execution of the law.

A single pending case illustrates the wide scope of the issues presented. *United States v. Anchor Oil Corporation* (S.D. Cal.) is a suit by the United States for injunctive relief to prevent continued removal of oil and gas from a field at Long Beach, California, in a manner which will continue to cause subsidence, now as much as 24 feet, in the area—to the great injury of the Long Beach Naval Shipyard and other federal installations. One cause of action is founded on the 1899 Act and the obstruction to and alteration of the navigable capacity caused by the sinking of the bed of the navigable waters. The narrow interpretation given to the 1899 Act by the court below, if followed,

would raise grave doubts as to the validity of that cause of action. For reasons now to be given, the instant decision fails to give effect to the manifest intention of Congress, unwarrantedly limits the basic statute and is contrary, at least in principle, to decisions of this Court and of other courts of appeals.

2. The primary issue—whether the deposit of industrial waste by the respondent companies, causing an obstruction to the navigable capacity of the Calumet River, is contrary to law—must be approached in the light of the background and purposes of the statutes involved. For present purposes, history commences with this Court's decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, that until Congress acts, which it had not in 1888, there was no law of the United States to prohibit obstructions and nuisances in navigable rivers. Congress did exercise its power in Section 10 of the Rivers and Harbors Act of 1890 by providing that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited." This Court, applying this prohibition to the non-navigable reaches of the Rio Grande, said (*United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 708):

> The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.

In 1896, Congress directed the Chief of Engineers to prepare a codification of the laws as to navigable rivers, which he did the following year, submitting the full text of existing laws and a proposed act "Revising and Enlarging Laws for the Protection of Navigable Waters." H. Doc. No. 293, 54th Cong., 2d Sess. In 1899, Senator Frye of the Senate Commerce Committee presented the bill on the floor of the Senate as an amendment to the Rivers and Harbors Appropriation Act then under consideration. He assured the Senate that the Commerce Committee had considered the bill at length and that no material change was made in existing law and that only slight changes to eliminate ambiguities had been made. A similar statement was made to the House in connection with the conference report. 32 Cong. Rec. 2296-2298, 2923. A change was made in the prohibition against obstructions, so as to tighten federal control, by altering the phrase "not affirmatively authorized by law" to read "not affirmatively authorized by Congress," thereby rendering state action insufficient to justify obstructions.[3]

In *Sanitary District* v. *United States*, 266 U.S. 405, this Court affirmed a decree enjoining the diversion of water from Lake Michigan through the Chicago River, resulting in an obstruction to the navigable capacity of the Great Lakes; the opinion of Mr. Justice Holmes referred (p. 429) to the 1899 Act as a "broad expression of policy in unmistakable terms, advancing upon" the 1890 Act. Holding that this

[3] In 1896, the circuit court had held that state authorization was sufficient under the 1890 Act, in *United States* v. *Bellingham Bay Boom Co.*, 72 Fed. 585 (D. Wash.), and in 1900 this Court agreed with that view. 176 U.S. 211.

prohibition applied to the case before the Court, the opinion continued (p. 429):

> There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, without regard to remote questions of policy.

Later, in *Wisconsin* v. *Illinois*, 278 U.S. 367, Chief Justice Taft said for the Court that the 1899 Act "amplified the provisions of an earlier Act of 1890" (p. 405) and that "[t]he policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890" (p. 412). The Attorney General likewise construed the 1899 Act as an assertion of Congressional authority over navigable waters and "thus to serve notice that they [projects affecting navigable waters] could not be undertaken without Federal assent." 34 Op. A.G. 411-412.

We turn now to the provisions particularly applicable to this case:

(a) Both the 1890 and the 1899 Acts prohibited "the creation of any obstruction" to the navigable capacity of waters subject to federal control. There is no dispute that the Calumet River is subject to federal power and that, under the findings, the companies have created an obstruction by causing the deposit which decreases the depth of the channel. There is no suggestion that authority has been obtained from Congress or a permit issued by the Department of the

Army.[4] Congress made no distinction based on the manner of creation of the obstruction. It prohibited "any obstruction." It follows that the steel companies' acts are expressly prohibited, just as were the acts of the Chicago Sanitary District rendering the lakes shallower by diverting water.

The reasoning upon which the court of appeals arrives at the conclusion that there has been no violation of this explicit prohibition is not clear. Its distinction of the *Sanitary District* case on the theory that that decision was based on enforcement of "treaty obligations to a foreign power" (Appendix, *infra*, pp. 26a-27a) ignores the fact that Justice Holmes three times stated that the treaty issue was an alternative ground and that the "main ground is the authority of the United States to remove obstructions to interstate and foreign commerce" (266 U.S. at pp. 423-424, 425, 426). And it is equally clear from the entire paragraph of which the opinion below merely quotes part of a sentence (Appendix, *infra*, p. 27a) that *Wisconsin* v. *Illinois*, 278 U.S. 367, in no way represented a retreat from the *Sanitary District* holding.

The court below cited *United States* v. *Wilson*, 235 F. 2d 251 (C.A. 2), as the "most important" authority (Appendix, *infra*, p. 11a). That case concerned a barge sunk in the Hudson River and, far from holding that the result was not an obstruction to navigable capacity, the basis of the decision was that, rather than injunction, the remedies specifically provided in

[4] Reading all the provisions of Section 10 of the 1899 Act together, this Court, agreeing with the opinion of the Attorney General quoted above, held that a permit under the latter provision of the section constituted an obstruction "affirmatively authorized by Congress" under delegated authority. *Wisconsin* v. *Illinois*, 278 U.S. 367.

such a situation by Sections 15 and 19 of the 1899 Act should be employed. The court did hold that the sunken barge was not a "structure", but not that it was not an "obstruction".[5]

The opinion of the court below indicates that it used a backwards process of reasoning whereby it, in effect, read the prohibition against "any obstruction not affirmatively authorized by Congress" out of the statute. It said that "Congress did not give the Army or its Engineers authority to authorize, sanction or recommend an obstruction which it had prohibited" and that "If the words, 'any obstruction,' are given their broad, inclusive scope, which the government would have us do, there would be no reason for the second and third clauses of Sec. 403" (*i.e.*, Section 10 of the 1899 Act) (Appendix, *infra*, p. 14a).[6] But this Court made clear the meaning of this section when it said in *Wisconsin* v. *Illinois*, 278 U.S. 367, 413:

> "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the

[5] The two trial court cases cited by the opinion (Appendix, *infra*, pp. 12a-13a) are clearly irrelevant. *United States* v. *Burns*, 54 Fed. 351 (D. W.Va.), a case decided prior to the 1899 Act, held the acts of one user of the stream in floating logs, rafts, etc., thereby interfering with other navigators, was not a prohibited obstruction. *United States* v. *Brazoria County*, 2 F.2d 861 (S.D. Tex.), held that natural erosion from a drainage ditch was not a prohibited obstruction.

[6] This statement is also erroneous for failure to recognize that the specific prohibitions against erection of piers, etc., and against filling or altering navigable channels, etc., without permit from the Army, apply regardless of whether the acts, if done, would constitute an obstruction to navigable capacity and hence proof of such obstruction need not be made to sustain a violation.

> recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.

The conclusion here that only those obstructions covered by the second and third clauses of the section are prohibited is thus at war with the express provision, the manifest intent of Congress, and the meaning given by this Court to the statute. There is, we submit, no warrant for re-creation of the situation existing before 1890 in which admitted obstructions to navigation without governmental approval were left unprohibited by federal law.

(b) The deposit of industrial solids resulting in choking the channel is also prohibited by the last provision of Section 10 that

> * * * it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

The court of appeals, reading "excavate or fill" together, said that it would be "unreasonable" to refer to removal of material in the water pumped from the channel "as an excavation and almost as unreasonable to think of the discharge as a fill" (Appendix, *infra*, p. 16a). But it is not the removal of material from the channel, or its return thereto, of which we complain. It is the introduction of solids which, while transported by the water, operate to fill in the channel, which is the cause of the obstruction. However accomplished, that deposit is, we submit, reasonably

embraced in the term "fill." Certainly, in view of the widespread use of hydraulic processes, an exception of fills accomplished by transport in dilution would create a serious loophole in the statute, contrary to the fundamental Congressional purpose.

Moreover, the court simply ignores the prohibition against "in any manner to alter or modify the course, location, condition, or capacity * * * of the channel." As this Court said in the *Sanitary District* case, "There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River * * * " (266 U.S. at p. 429). Here again, the court below appears to have reasoned backwards, as follows: Taking a narrow view of the "work" which the Secretary may approve, it reasons that this deposit would not be authorized, and therefore, it concludes, the deposit is not prohibited. But even assuming the correctness of the court's premise, the result would simply be that the Congressional prohibition was broader than the permission delegated to the administrative authorities and that fills not accomplished by "work", in the narrow sense could only be authorized by Congress. That does not justify the strained meaning given the word "fill." Moreover, we believe that the word "work" may properly be used in the broad meaning of activity producing the result.[7] The suggestion (Appendix A, *infra*, p. 59a) that the result of the

[7] This construction is confirmed by the earlier provision of the section where, when dealing with structural things like piers, etc., the statute requires approval of "plans" rather than the "work." The statute of which this section was a codification, without any intent to relax federal control, did not use the term "work" at all. Section 7 of the Act of 1890, 26 Stat. 454.

companies' discharges could not be foretold in advance is contradicted by the long history of the Calumet channel and the companies' removal of deposits from it.

(c) It was the administrative construction, concurred in by the House Committee in its report, that the deposits here violated the provisions of Section 13 of the 1899 Act:

> That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; * * *

Here again, Congress used broad, all-inclusive language encompassing "any refuse matter of any kind or description whatever." The court of appeals, however, broadly construed the exception "other than that flowing from streets and sewers and passing therefrom in a liquid state." In a sense the companies discharge the waste product, which is a solid, even though small, of rock or metallic nature, in wastes through "sewers." But that product does not fit the definition of a "liquid state." The statute seems clearly to use "sewers" in the sense of pipes discharging what is normally defined as sewage. Illustrative of the distinction is *Sanitary District of*

Chicago v. *Chicago Packing Co.*, 241 Ill. App. 288 (not involving the Rivers and Harbors Act), where the court drew a distinction between sewage in the usual sense and waste products from the meat packers at the Chicago Stock Yards, consisting of garbage, bones, parts of dead animals and other solid matter.

The exception of Section 13 of the 1899 Act applied, not to solids carried by liquids, but to refuse "in a liquid state." Like the other parts of the Act, this section was simply a codification of existing law. The expression "refuse matter of any kind or description" was substituted for "ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind." This history precludes a conclusion that any waste product of a mill could be discharged so long as it was transported by water through a sewer pipe. Such a construction would read out of the statute the second limitation "and passing therefrom in a liquid state." Though transported by vast quantities of water, it cannot be denied that the flue dust and other materials here involved are "industrial solids," as the findings state. A construction that such solids were within the exception merely because they were discharged in water from a sewer pipe would also very largely destroy the prohibition against discharge of "dredgings, sludge and acid" since a permanent discharge of such materials is most often through the medium of permanent pipes which would be within a broad meaning of "sewer."

In this connection, the discussion by the court (Appendix A, *infra*, pp. 18a-19a) of pollution and the progress that has been made since 1899 in the treatment of sewage is beside the point. We are not dealing here with a statute aimed at the prevention of ordinary

pollution, but with prohibitions against interference with navigation, and with the policy of Congress, unchanged since 1899, of compelling riparian owners and users of navigable streams to bear the burden of eliminating any injury to navigable capacity their use may produce. We note also the apparent theory (Appendix A, *infra*, pp. 15a-16a) that a single act cannot violate more than one prohibition of the statute and hence that a holding that Section 13 was violated necessarily means Section 10 was not.[8] There is no reason compelling a conclusion that the various prohibitions are mutually exclusive, so that the deposit of mud in a river by a hydraulic process creating a dike would not be an illegal fill creating an illegal obstruction accomplished by the deposit of refuse matter in the river—thus violating all three provisions here invoked by the United States. That, in our view, is this case. The only difference is that the refuse is industrial solids and is in a somewhat greater stage of dilution than would normally be the case in hydraulic dredging.

3. The availability of equitable relief is likewise clear. In *Sanitary District* v. *United States*, 266 U.S. 405, a decree enjoining diversion of water from Lake Michigan was affirmed. In *New York* v. *New Jersey*, 256 U.S. 296, this Court sustained the right of the United States to intervene seeking an injunction against the deposit of sewage in New York Harbor by New Jersey which would result in filling and shoaling the channels, to the detriment of navigation; would render the waters unsightly and unhealthy; and would

[8] The opinion criticizes the United States for not taking a "firm stand on the precise violation upon which it relies" (Appendix A, *infra*, p. 23a). We rely on all three, and are not compelled to elect one.

damage federal property on the shores of the harbor. The opinion clearly contemplated that, except for a stipulation with New Jersey, the requested injunction would, upon proof of the allegations, be granted.[9]

The courts have recognized the authority of the Attorney General to seek an injunction against illegal interference with commerce. *In re Debs*, 158 U.S. 564; *North Bloomfield Gravel Mining Co.* v. *United States*, 88 Fed. 664 (C.A. 9). In *United States* v. *Ingram*, 203 F. 2d 91, 97 (C.A. 8), deviation from plans as to a bridge over navigable waters, contrary to statute, was enjoined on the ground that the violation would thwart "the public policy which Congress has made applicable thereto, against which the Government is inherently entitled to seek protection through a writ of injunction." Cf. Griffin v. United States, 8 Cir., 168 F. 2d 457, 459; Economy Light & Power Co. v. United States, 256 U.S. 113, 124, 41 S. Ct. 409, 65 L. Ed. 847." Even private parties may enjoin illegal deposits in navigable streams and obtain a mandatory injunction to compel dredging. *Conversi* v. *Portsmouth Cotton Oil Refining Corp.*, 281 Fed. 981 (C.A. 4), certiorari denied, 260 U.S. 724.

In addition, general equitable principles support the award of both negative and mandatory injunctions.[10] While no express finding of fact was made

[9] The circumstance that the United States was an intervenor rather than plaintiff in its own action has no legal significance in this context. (Cf. Appendix A, *infra*, pp. 27a-28a.)

[10] Authority for the fact that reliance in the trial court on the statutes does not preclude justification of the injunction on general equitable principles is found in the *Sanitary District* case where the Court said that reliance on the 1899 Act in the bill "does not exclude a reliance upon more general principles if they were needed in order to maintain it" (p. 424).

that the remedy at law was inadequate, it is clear that there is a continuous violation of law. Equitable relief is clearly appropriate to prevent a multiplicity of suits. *Archer v. Greenville Gravel Co.*, 233 U.S. 60, 65; 4 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) sec. 253, pp. 501-505. And the undisputed facts plainly show that the remedy at law by an action for damages is inadequate.

The court of appeals thought that Congress "has not only failed to authorize such relief but has by strong implication excluded the same" (Appendix A, *infra*, p. 22a). This conclusion rests entirely on a change of language occurring at the time the laws were codified. Section 10 of the 1890 Act provided that "the creating or continuing of any unlawful obstruction * * * may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court." Section 12 of the 1899 Act, codifying the enforcement provisions applicable to Sections 9, 10 and 11, provided that "the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court."

The court of appeals' result is based on three premises, each of which we believe is erroneous. They are: (a) the 1899 Act repealed the 1890 Act, (b) the deposit here cannot be construed as a "structure" and (c) the limited remedy of Section 12 is exclusive. It should first be noted that the report of the case shows that this argument was advanced in the *Sanitary District* case (see 266 U.S. at p. 408), where no structure was involved, yet this Court affirmed the injunction without comment on the jurisdictional objection.

(a) Rather than specifically repealing the 1890 Act, Section 20 of the 1899 Act repealed only "all laws or parts of laws inconsistent with the foregoing sections." Within a few years of the 1899 Act, the Ninth Circuit sustained a bill in equity to enjoin continuance of a log boom which obstructed navigation, saying as to the repealing section (*United States* v. *Wishkah Boom Co.*, 136 Fed. 42, 45): "It is only necessary to quote the repealing clause to show that both the act of 1890 and that of 1899 are operative, as far as the present case is concerned. The provision of the earlier act prohibiting the maintenance of such obstructions is not inconsistent with the later act prohibiting the erection thereof * * *." The Court of Appeals for the Second Circuit, in *United States* v. *Wilson*, 235 F. 2d 251, discussed *supra*, pp. 11-12, recognized conflict with the Ninth Circuit and said "We cannot agree with that holding."[11] We do not quarrel with the *Wilson result* since explicit, detailed procedures are given for the removal of a sunken barge. We think, however, especially in view of the legislative history ignored in the *Wilson* case, that the Ninth Circuit correctly ruled that as to permanent obstructions both statutes are still applicable. Without recognizing the conflict, the court below adopted the Second Circuit view, saying "The Act of 1890 was repealed by the Act of 1899" (Appendix A, *infra*, p. 24a). And on this ground it distinguishes this Court's

[11] In a footnote, the *Wilson* case said that the Ninth Circuit had advanced the "alternative and unimpeachable ground" that the cause of action occurred prior to the 1899 Act. But the Ninth Circuit, deciding the case in 1905, was dealing with an injunction and was certainly not contemplating such a vain act as ordering removal of a log boom which could be immediately re-established and, under the *Wilson* theory, be immune from injunctive order.

Rio Grande case, saying that the result there would have been different after the 1899 Act became effective (Appendix A, *infra*, pp. 25a-26a). But this Court's *Sanitary District* opinion assumed that *Rio Grande* was still good law (see *supra*, p. 10). And the fact is that the *Rio Grande* opinion was announced almost three months after the 1899 Act became law.

In assuming that Congress intentionally and substantially changed the law by drastically curtailing the remedies available to enforce the prohibition for the protection of navigable waters, both the court below and the Second Circuit overlook the clear legislative history showing that, rather than limiting federal control, the 1899 Act was, as this Court said, an advancement upon and an amplification of the existing law (*supra*, pp. 9-10).

(b) The narrow construction given to Section 13 of the 1899 Act by the court below tends to frustrate the Congressional purpose. The change from the word "obstruction" to the phrase "structures or parts of structures" was not, we believe, significant as far as the present case is concerned. "Structures" should, in our view, be read to mean any permanent obstruction, rather than some narrower term, limited to buildings or things constructed of wood or other materials. Certainly, a dike created by placing dirt or mud between piles would be a structure. The same result can be obtained by using the natural action of spring floods carrying silt, producing a dike which is just as clearly a structure.[12] So here, the natural consequence of the companies' actions was to create what

[12] In the Mississippi basin, the river current is frequently used in this way to build protective dikes.

would become a dike if the fill were allowed to continue up to the water surface.

(c) The negative implication that Congress intended to change existing law and to deny remedies for illegal acts is contradicted by the legislative history and by the many contrary decisions cited above. The present decision, so far as we know, stands alone and attributes to Congress the intention of declaring particular acts illegal, but denying the normal remedy to correct these consequences. In this connection, at the conclusion of its opinion the court of appeals invokes *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, and other cases, and asserts that the "government", meaning the Attorney General, cannot seek relief until Congress has exercised its commerce power, and that the present argument should be made to Congress not the courts (Appendix A, *infra*, pp. 28a-31a). But Congress did dispose of the *Willamette* case almost 70 years ago when it declared obstructions to be prohibited (*supra*, p. 8). The legislative history shows that the 1890 Act was specifically intended to cure the situation revealed by the *Willamette* case and, in fact, was introduced by Senator Dolph who represented the losing party in the *Willamette* case. 21 Cong. Rec., 8604, 8605.

(d) Finally, even if the district court erred in granting injunctive relief, the proper procedure under Rule 54(c), F.R.Civ.P., would be to remand the case to award the cost of dredging, not to dismiss it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

APRIL, 1959